

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF TEACHING

In the Matter of the Proposed Rule Governing
Paraprofessional Credentialing, Minnesota
Rules Chapter 8710

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The proposed rules govern the creation of a voluntary state-wide credential for education paraprofessionals who assist licensed teachers.

Administrative Law Judge Eric L. Lipman of the Office of Administrative Hearings conducted a hearing on Wednesday, March 10, 2010. The hearing commenced at 8:30 a.m., in Room 16 of Conference Center B of the Minnesota Department of Education (MDE), 1500 Highway 36 West, Roseville, Minnesota.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.¹ The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.²

Bernard Johnson, Assistant Attorney General, appeared at the rule hearing on behalf of the Board. The members of the Board's hearing panel were Karen Balmer, Executive Director of the Board, and Trudy Hervey of the Minnesota Department of Education (MDE). The Board sponsored testimony in support of the rule from Richard

¹ See, Minn. Stat. §§ 14.131 through 14.20.

² Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25 (2008).

Herriges of Education Minnesota; Teri Wallace of the University of Minnesota; and Barbara Jo Stahl of the University of St. Thomas.

Twenty-seven people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for another 20 calendar days – until March 30, 2010 – to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.³ The hearing record closed on April 6, 2010.

SUMMARY OF CONCLUSIONS

With one exception, the Board has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. Minnesota's public schools employ education paraprofessionals to provide a variety of services to students. These staff members are not licensed teachers; but rather provide assistance to licensed teachers in and around the classroom.

2. In 2003, the Minnesota Legislature enacted Minn. Stat. § 120B.363. The statute directed the Board to "adopt rules to implement a statewide credential for education paraprofessionals who assist a licensed teacher in providing student instruction."⁴

3. In 2003, the Board began the rulemaking process to meet this mandate. Due to a variety of factors, however, the Board did not adopt a rule before the authority to promulgate these regulations expired.⁵

4. In 2007, the Legislature again directed the Board to adopt a rule governing paraprofessional credentialing. The legislation referred back to the 2003 statute,

³ See, Minn. Stat. § 14.15, subd. 1 (2008).

⁴ See, Minn. Stat. § 120B.363, subd. 1 (2008).

⁵ Compare SONAR at 1-3 and 2003 Laws of Minnesota, Chapter 129, Article 1, Section 10 with Minn. Stat. § 14.125 (2008).

exempted this rulemaking from the statutory expiration of rulemaking authority, set a January 1, 2008 deadline for a notice of hearing, and included authorization for the Board to charge a fee for issuing the credential.⁶

5. In response to the 2007 legislation, the Board convened a working group and developed a revised proposed rule for a voluntary credential for Minnesota paraprofessionals. The working group consisted of representatives from the Board of Teaching, Education Minnesota, the University of Minnesota and the Minnesota Department of Education.⁷

6. The Board satisfied the requirements of Minn. Stat. § 14.125 when it published a Dual Notice with respect to rules for paraprofessional credentialing on December 31, 2007.⁸

7. The Board completed the rulemaking process in March of 2008.⁹

8. Because paraprofessionals can be subject to various and differing training requirements – including the requirements of P.L. 107-110 (known as “No Child Left Behind” or NCLB) and Minn. Stat. § 120B.363, subdivision 3 – the Working Group recommended a voluntary credentialing system for Minnesota paraprofessionals.¹⁰

9. No Child Left Behind requires school districts that receive Title I funds to ensure that all paraprofessionals hired after the date of enactment, and who work in programs supported by Title I funds, have:

- (A) completed at least two years of study at an institution of higher education;
- (B) obtained an associate’s (or higher) degree; or
- (C) met a rigorous standard of quality and can demonstrate, through a formal State or local academic assessment,
 - (i) knowledge of, and the ability to assist in instructing reading, writing, and mathematics; or,
 - (ii) knowledge of, and the ability to assist in instructing reading readiness, writing readiness, and mathematics readiness, as appropriate.

⁶ 2007 Laws of Minnesota, Chapter 146, Article 2, Section 34.

⁷ Ex. QQ.

⁸ 32 S.R. 1229.

⁹ SONAR at 2.

¹⁰ Board Presentation; Ex. QQ.

Additionally, the NCLB Act required school districts to ensure that paraprofessionals employed by school districts working in programs supported by Title I funds at the time the Act was passed would meet these same requirements no later than four years after the date of enactment.¹¹

10. In a Report issued on May 5, 2008, Administrative Law Judge Kathleen Sheehy found that the rules proposed by the Board were unreasonably vague with respect to the criteria and standards to be used for demonstrating paraprofessional competence. The Administrative Law Judge also determined that any amendments to the proposed rule to correct the identified defects would result in language substantially different from that proposed and published in the *State Register*. The Administrative Law Judge concluded that the Board had not demonstrated the need for and reasonableness of the proposed rule.¹²

11. Because there was no remedy available to address the defects identified in the May 5, 2008 report, the Board launched a new rulemaking initiative in July 2008. The Working Group was reconvened and was expanded to include representation from Special Education Directors and Human Resource Directors. Representatives from both of these groups had voiced concerns during the 2008 rulemaking process and at the public hearing.¹³

12. In this rulemaking proceeding, the Board proposes a set of provisions to address the defects identified in the May 5, 2008 rule report.

13. The proposed rule obligates the Board to grant a credential to persons who meet certain professional requirements, as detailed in the proposed rules. In order to obtain the credential, the proposed rule requires that a paraprofessional demonstrate competence in nine areas and pass a state-approved examination.¹⁴

14. Further, verification of an applicant's completion of training in the nine core competencies set forth in the rule must be provided by the Board.¹⁵

15. Lastly, the proposed rule establishes procedures for submitting applications for the credential and the receipt of processing fees by the Board of Teaching.¹⁶

¹¹ See, 20 U.S.C. § 6319 (d) (2008); 34 C.F.R. § 200.58 (d) (2009); *In the Matter of the Proposed Rule Governing Paraprofessional Credentialing, Minnesota Rules Chapter 8710*, OAH Docket No. 3-1302-19260-1, at 3 (2008) (<http://www.oah.state.mn.us/aljBase/130219260rr.htm>).

¹² SONAR at 2; See, Report of the Administrative Law Judge *In the Matter of the Proposed Rule Governing Paraprofessional Credentialing, Minnesota Rules Chapter 8710*, OAH Docket No. 3-1302-19260-1 (2008) (<http://www.oah.state.mn.us/aljBase/130219260rr.htm>).

¹³ SONAR at 2; Ex. QQ.

¹⁴ Proposed rule part 8710.9000, subparts 3 and 4.

¹⁵ Proposed rule part 8710.9000, subpart 5.

¹⁶ Proposed rule part 8710.9000, subpart 6.

II. Procedural Requirements of Chapter 14

16. On November 10, 2008, the Board filed with the Chief Administrative Law Judge a draft Request for Comments document and the additional notice plan relating to this Request. The Board asked the OAH to review and approve its proposed notice plan.¹⁷

17. By letter dated December 10, 2008, the undersigned Administrative Law Judge approved the additional notice plan contingent upon the Board adding three additional organizations to the list of persons receiving notice of the rulemaking proceeding. The three organizations were: the Minnesota Staff Development Council, the Minnesota School Employees' Association, and ARC – Greater Twin Cities.¹⁸

18. On January 12, 2009, the Board published in the *State Register* a Request for Comments seeking information regarding its proposed credentialing rule. The Request for Comments was published in the *State Register* at 33 S.R. 1226.¹⁹

19. The Request for Comments was sent to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons and associations identified in the approved additional notice plan.²⁰

20. The Request for Comments was also posted on the Board's website.²¹

21. On December 28, 2009, the Board filed with the Office of Administrative Hearings copies of the proposed Dual Notice, the proposed rules and a draft Statement of Need and Reasonableness (SONAR).²²

22. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefit of the proposed rules on local units of government.²³

23. In a memo issued January 15, 2010, MMB reviewed the Board's proposed rule and found that the rule will have minimal fiscal impact on local units of government given that local districts are no longer responsible for the verification process.²⁴

¹⁷ See, Ex. I; Minn. R. 1400.2060 (2007).

¹⁸ Ex. J.

¹⁹ Exs. K and L.

²⁰ Exs. I, M and N.

²¹ Ex. O.

²² Ex. Z.

²³ Ex. X (The Board's letter, dated December 17, 2009, was addressed to the Department of Finance. However, the Departments of Finance and Employee Relations were merged into MMB in June of 2008).

²⁴ Ex. CC.

24. In a separate memo, issued on the same date, MMB also noted that, depending upon how many paraprofessionals seek credentialing, the administrative burden on the Board could be more than the Board could absorb on its current operating budget.²⁵

25. By letter dated January 12, 2010, the undersigned Administrative Law Judge approved the Board's Dual Notice.²⁶

26. On January 19, 2010, the Board mailed a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. §§ 14.131 and 14.23.²⁷

27. On January 19, 2010, the Board sent by electronic mail a copy of the Dual Notice to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.²⁸

28. The Dual Notice identified the date and location of the hearing in this matter.²⁹

29. On January 25, 2010, a copy of the proposed rule and Dual Notice were published in the *State Register*.³⁰

30. On February 26, 2010, the Board mailed a Notice of Hearing to those persons who requested a hearing on the proposed rules and to all persons and associations on the Board's rulemaking list.³¹

31. At the hearing on March 10, 2010, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's resolution authorizing Karen Balmer, Executive Director of the Board, to proceed with rulemaking relating to paraprofessional credentialing.³²

²⁵ Ex. DD.

²⁶ Exs. AA and BB.

²⁷ Ex. EE.

²⁸ Exs. GG, HH, II and JJ.

²⁹ *Id.*

³⁰ Ex. LL; 34 S.R. 1016 (January 25, 2010).

³¹ Exs. MM, NN, and OO.

³² Ex. A.

- b. the Board's Request for Comments as published in the *State Register* on January 12, 2009;³³
- c. the proposed rules dated December 11, 2009, including the Revisor's approval;³⁴
- d. the agency's Statement of Need and Reasonableness (SONAR);³⁵
- e. the certification that the Board mailed a copy of the SONAR to the Legislative Reference Library on January 19, 2010;³⁶
- f. the Dual Notice of Hearing as mailed and as published in the *State Register* on January 25, 2010;³⁷
- g. Certificates of Mailing a Dual Notice of Hearing to the rulemaking mailing list and to the parties identified in the Additional Notice Plan on January 19-22, 2010, and the mailing lists used as of those dates;³⁸
- h. a Certificate of Mailing the Dual Notice of Hearing to the Chairs of the Legislative Committees of Education Policy and Finance on January 21, 2010;³⁹
- i. the written comments on the proposed rule that the Board received during the comment period that followed the Dual Notice;⁴⁰ and
- j. a list of the witnesses called by the agency to testify on behalf of the proposed rule.⁴¹

III. Statutory Authority

32. The Board of Teaching's authority to adopt the proposed rules is set forth in two places in state law. Minn. Stat. § 120B.363 provides that:

³³ Ex. L.

³⁴ Ex. V.

³⁵ Ex. FF.

³⁶ Ex. EE.

³⁷ Ex. BB and LL.

³⁸ Exs. GG, HH, II and JJ. The Certificate of the Accuracy of the Mailing List is contained in Ex. II.

³⁹ Ex. HH.

⁴⁰ Exs. P and RR.

⁴¹ Ex. PP.

The board of teaching must adopt rules to implement a statewide credential for education paraprofessionals who assist a licensed teacher in providing student instruction. *Any paraprofessional holding this credential or working in a local school district after meeting a state-approved local assessment is considered to be highly qualified under federal law. Under this subdivision, the board of teaching, in consultation with the commissioner, must adopt qualitative criteria for approving local assessments that include an evaluation of a paraprofessional's knowledge of reading, writing, and math and the paraprofessional's ability to assist in the instruction of reading, writing, and math.* The commissioner must approve or disapprove local assessments using these criteria. The commissioner must make the criteria available to the public.

Additionally, Chapter 146 of the 2007 Laws of Minnesota provides that:

(c) Notwithstanding the time limit in Minnesota Statutes, section 14.125, the Board of Teaching must adopt the rules it was mandated to adopt under Laws 2003, chapter 129, article 1, section 10. The board must publish a notice of intent to adopt rules or a notice of hearing for rules subject to this section before January 1, 2008.

(d) The Board of Teaching may charge fees to issue new credentials and to renew credentials for paraprofessionals issued credentials under the rules adopted under this section.⁴²

33. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing educational paraprofessional certification.

IV. Impact on Farming Operations

34. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

35. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the proposed rule will not affect farming operations in Minnesota. Further, the Administrative Law Judge concludes that the Board's failure to address this requirement in the rule record is a harmless error and no additional notice was required. No person or entity was deprived of an opportunity to participate meaningfully in the rulemaking process.⁴³

⁴² Minn. Stat. § 120B.363, subd. 1 (2008) (emphasis added); 2007 Laws of Minnesota, Chapter 146, Article 2, Section 34.

⁴³ See, Minn. Stat. § 14.15, subd. 5.

V. Additional Notice Requirements

36. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made. The Board submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved on December 10, 2008. During the rulemaking proceeding, the Board certified that it provided notice to those on the rulemaking list maintained by the Board and in accordance with its additional notice plan.⁴⁴

37. The Board made efforts to inform and involve parties in the rulemaking including:

- Ø Individuals and groups on the Board of Teaching's Rulemaking List;
- Ø Minnesota Department of Education;
- Ø Professional Organizations;
- Ø Chairs and Vice-Chairs of the Education Committees of the Minnesota Senate and Minnesota House of Representatives;
- Ø All superintendents and charter school directors via the MDE Superintendent weekly Electronic Mail List;
- Ø Deans and Chairs of all approved Minnesota teacher preparation programs; and,
- Ø the following Minnesota professional organizations related to education: Association of Metropolitan School Districts; Board of School Administrators; Education Minnesota; Minnesota Association of School Personnel Administrators; Interfaculty Organization; Minnesota Association of Colleges of Teacher Education; Minnesota Association of Alternative Programs; Minnesota Association of School Administrators; Minnesota Elementary School Principals Association; Minnesota Association of Secondary School Principals; Minnesota Association of Charter Schools; Minnesota Rural Education Association; Minnesota School Boards Association; Minnesota Independent School Forum; Minnesota State Colleges and Universities; Minnesota Administrators for Special Education; Minnesota Staff Development Council; ARC- Greater Twin Cities; and Minnesota School Employees' Association.⁴⁵

⁴⁴ Exs. GG, HH, II and JJ.

⁴⁵ SONAR at 6; Exs. I and J.

38. In communicating the proposed rule language to interested persons, the Board has satisfied its obligations under Minn. Stat. §§ 14.131 and 14.23.

VI. Statutory Requirements for the SONAR

39. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness. Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

A. Regulatory Analysis

- (1) **A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

40. The Board indicated in its SONAR that the proposed rules will affect paraprofessionals, as well as the students, parents, teachers and school administration officials that work with these professionals.⁴⁶

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

41. The Board asserts that compliance with the proposed rule will require few resources from school districts. The Board asserts that the bulk of the costs will fall on the individual paraprofessionals who tender application fees as part of the credentialing process. The Board acknowledges, however, that the proposed rule will have staff impacts upon the Board (when verifying competencies) and upon MDE's Educator Licensing Division (when processing applications). With respect to its own program costs, the Board states that if it invites those with expertise in paraprofessional preparation and development to assist the Board with the review of applications, it could incur additional costs – such as mileage reimbursement or substitute pay.⁴⁷

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

42. The Board asserted that there are no less costly methods for achieving the purposes of the proposed rules. It asserts that cost and efficiency are key features of its proposed rule and that based on input from its stakeholders, it has proposed the least costly and most efficient methods for achieving its regulatory goals.⁴⁸

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

43. Pointing to provisions of Chapter 146 of the 2007 Laws of Minnesota, which oblige the Board to undertake rulemaking, the Board asserts there are no alternatives to the proposed rules.⁴⁹

⁴⁶ SONAR at 4.

⁴⁷ SONAR at 4.

⁴⁸ SONAR at 4-5.

⁴⁹ *Id.* at 5.

(5) The probable costs of complying with the proposed rules.

44. The application fee associated with the credentialing process will be \$57 – the same amount charged for processing of a teacher license.⁵⁰

45. As noted above, the Board estimates that the proposed rule will require additional staff resources from both the Board and MDE’s Educator Licensing Division to review and process the applications. Yet, because paraprofessionals are not required to obtain this credentialing, the Board cannot now predict how much demand there will be for this accreditation. Thus, the Board did not submit an estimate of the amount of time required to complete the associated staff work.⁵¹

46. The Board predicted that the cost for local school districts “should be negligible.”⁵²

47. Several commentators asserted that the proposed rules were unreasonable because the rules will necessarily result in an imposition of burdensome costs on local school districts. Some commentators argued that those paraprofessionals who seek the new credential will insist that local “in-district” training programs be tailored toward establishing the required competencies. Still others asserted that the proposed rule will translate into increased recordkeeping and administrative costs for local school districts. Thus, to the extent that the proposed rule will result in a diversion of existing resources or oblige the expenditure of new resources, the commentators complain that the new requirements are neither affordable nor reasonable.⁵³

48. In response to these comments, the Board emphasizes that the paraprofessional accreditation process is voluntary. The Board assumes that local school districts will not undertake any training obligations during collective bargaining talks or maintain any administrative processes that are not sustainable and affordable.⁵⁴

49. Additionally, pointing to the submissions from the Minnesota Office of Management and Budget, the Board asserts that proposed rule will have minimal fiscal impact on local units of government – principally because local districts are not required to undertake the process of verifying an applicant’s competencies and entitlement to accreditation.⁵⁵

⁵⁰ SONAR at 5. See also, Minn. Stat. § 122A.21, subd. 1.

⁵¹ SONAR at 5.

⁵² *Id.* at 5.

⁵³ See, e.g., Exs. P and RR.

⁵⁴ Board’s Response, at 1 (March 29, 2010).

⁵⁵ *Id.*

50. Noting that the impact of the proposed rule upon paraprofessional salaries or benefits was not “discernable or quantifiable” at this time, the Minnesota Office of Management did not project what effect the rule would have on school district finances.⁵⁶

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

51. Regarding the sixth factor, the Board stated that a refusal to carry out the mandate to undertake rulemaking might prompt the Legislature to take legislative or budgeting actions against the agency.⁵⁷

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

52. In the SONAR, the Board described the paraprofessional requirements under NCLB as follows:

The federal No Child Left Behind law requires all paraprofessionals who serve in Title I or special education settings to meet minimum eligibility requirements. Specifically, these paraprofessionals are required to demonstrate competence in one of three ways:

1. Two years of study at an institution of higher education; or
2. An Associate’s degree (or higher); or
3. A demonstration, through a formal state or local academic assessment:
 - a. knowledge of and the ability to assist in instructing reading, writing, and math; or,
 - b. knowledge of and the ability to assist in instructing reading readiness, writing readiness, and math readiness.⁵⁸

53. The Board concluded that the proposed rule is not in conflict with NCLB or any other federal regulations.⁵⁹

⁵⁶ *Id.*

⁵⁷ SONAR at 5.

⁵⁸ *Id.*

⁵⁹ *Id.*

B. Performance-Based Regulation

54. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states further that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”⁶⁰

55. The Board maintains that “in developing the proposed rule, [it] considered and implemented performance-based standards that emphasize superior achievement in meeting the Board’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.” The Board contends that “the proposed rule relies on core competencies, which were developed by the Minnesota Department of Education. According to our stakeholders, these competencies reflect best practice for paraprofessionals.”⁶¹

56. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

C. Consultation with the Commissioner of Management and Budget

57. Under Minn. Stat. § 14.131, the agency is required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.” Minnesota Management and Budget (MMB) is the successor agency to the Department of Finance.⁶²

58. On December 17, 2009, the Board sent to the Commissioner of MMB the Governor’s Office Proposed Rule and SONAR Form; the proposed rules; and the proposed SONAR. By way of two different memoranda, each dated January 15, 2010, MMB made its replies regarding the proposed rule. In the first memorandum, the MMB concluded that the proposed rule would have minimal fiscal impact on local units of government. In the second memorandum, the MMB concluded that the proposed rule “may place an administrative burden on the Board of Teaching that it cannot absorb within the available budget.” The MMB noted that the Board has agreed to assume responsibility for verifying paraprofessional credentialing and is proposing that the review of applications be completed by volunteer evaluators from various organizations

⁶⁰ Minn. Stat. § 14.131 (2008).

⁶¹ SONAR at 6.

⁶² Minnesota Management and Budget was formed from the merger of the Department of Finance and Department of Employee Relations. Laws of Minnesota 2008, Chapter 204.

with paraprofessional expertise. The Board does not have the resources to pay stipends to these evaluators or to reimburse their expenses. Because the number of individuals that will seek credentialing is unknown, the MMB concluded that the administrative impact on the Board could be significant. The MMB expressed concern that the Board is taking on responsibilities which will outpace its resources.⁶³

59. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 to consult with the Commissioner of Management and Budget.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

60. Under Minn. Stat. § 14.127, the Board must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board is obligated to make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁴

61. In the SONAR, the Board indicated that after consideration of this requirement it has determined that the cost of complying with the proposed rules in the first year will not exceed \$25,000 for any small business or city.⁶⁵

62. The basis for the Board’s determination was not explained.

63. While there was no detail as to how the Board arrived at its conclusion, the Administrative Law Judge finds that the failure to address this point is harmless error. There is no evidence in the record to conclude that the rule will impose significant costs upon any small business or small city as identified in Minn. Stat. § 14.127, and so the Board’s failure to address this point in its submissions “did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”⁶⁶

E. Adoption or Amendment of Local Ordinances

64. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before

⁶³ Ex. DD.

⁶⁴ Minn. Stat. § 14.127, subd. 1 and 2.

⁶⁵ SONAR at 10.

⁶⁶ Minn. Stat. § 14.15, subd. 5.

the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁷

65. The Board determined that no local governments would be required to adopt or amend an ordinance to comply with the proposed rules because the credential is voluntary for individual paraprofessionals and there is minimal verification required by local school districts.⁶⁸ The Administrative Law Judge approves that determination.

VII. Rulemaking Legal Standards

66. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.⁶⁹

67. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,⁷⁰ “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),⁷¹ and the agency’s interpretation of related statutes.⁷²

68. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁷³ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”⁷⁴

⁶⁷ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

⁶⁸ SONAR at 11.

⁶⁹ See, Minn. R. 1400.2100 (2007).

⁷⁰ See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

⁷¹ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁷² See, *Mammenga v. Board of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁷³ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁷⁴ Compare, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

69. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.⁷⁵ Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁷⁶

70. Because the Administrative Law Judge is suggesting changes to the proposed rules after original publication of the rule language in the *State Register*, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;”

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

71. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

VIII. Rule-by-Rule Analysis

72. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that

⁷⁵ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

⁷⁶ *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the agency's regulatory choice or otherwise requires closer examination.

73. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

74. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

75. In the Section below, the provisions of each subpart of the proposed rule are addressed.

76. In the Memorandum that follows the Findings and Conclusions, the Administrative Law Judge addresses a few of the key critiques made by commentators regarding the proposed rule.

Subpart 1 – In general

77. Subpart 1 of proposed rule 8710.9000 describes the overall scope of the education paraprofessional credential program. The subpart states:

Subpart 1. **In general.** The Board of Teaching shall grant a credential, which is not considered a license, to applicants who meet all requirements of this part. An applicant must provide evidence of satisfactory demonstration of the nine core competencies listed in subpart 4. Submission of an application for a paraprofessional credential is voluntary and is not a state requirement for employment.

78. The Board asserts that this subpart confirms the authority of the Board to establish the credential and that holding this credential “is not a state requirement for employment.”⁷⁷

79. Establishment of this credential was directed by the Legislature. The language of subpart 1 is needed and reasonable.

Subpart 2 – Scope of practice

80. Subpart 2 provides that the credential equals recognition from the state that a paraprofessional has “demonstrated additional training and preparation in competencies consistent with subpart 4” to assist licensed teachers in providing student

⁷⁷ SONAR at 6.

instruction for any “state and federally funded birth through grade 12 programs including transition programs.”

81. The Administrative Law Judge concludes that the Board’s chosen scope of practice reasonably follows from the requirement to “implement a statewide credential for education paraprofessionals who assist a licensed teacher in providing student instruction.”⁷⁸ Subpart 2 is needed and reasonable.

Subpart 3 – Credential requirements

82. Subpart 3 provides as follows:

Credential requirements. A candidate for a paraprofessional credential must submit documentation for verification of:

- A. 60 clock hours of training reflecting each of the nine competency areas in subpart 4;
- B. a minimum of two consecutive years of service in the same school district as a paraprofessional; and
- C. passage of a state-approved examination in reading, writing, and mathematics for paraprofessionals.

The Board states that this subpart identifies the three requirements for earning a paraprofessional credential. The Board maintains that the language of this subpart responds directly to the critique in the prior rulemaking – OAH Docket Number 3-1302-19260-1 – that the methods for demonstrating “the nine core competencies” were not explicit or clear. The proposed rule requires paraprofessionals to document 60 clock hours of training reflecting each of the nine competency areas. The Board notes that “clock hours” has long been used as a means of demonstrating training in the context of teacher licensing, and is a reasonable method in this setting.

83. One commentator expressed concern that the phrase “submit documentation for verification” is vague and does not specify what type of documentation will be deemed adequate and acceptable. The commentator argues that the rule language does not make clear which source of training is required for meeting the documentation requirement.⁷⁹

84. The Board did not address this comment directly in its written submissions. The Administrative Law Judge concludes, however, that the language actually benefits those seeking the credential by not limiting the type of documentation that can be submitted in support of the credential.

⁷⁸ *Compare*, Minn. Stat. § 120B.363, subd. 1 (2008).

⁷⁹ Ex. RR.

85. Likewise, the Board's chosen documentation methods reasonably follow from the requirement to "adopt qualitative criteria for approving local assessments that include an evaluation of a paraprofessional's knowledge of reading, writing, and math and the paraprofessional's ability to assist in the instruction of reading, writing, and math."⁸⁰ Subpart 3 is needed and reasonable.

Subpart 4 - Competencies

86. The statute permits the Board to determine the specific competencies to be established for the credential, as long as the requirements include instructional skills in reading, writing, and mathematics. Subpart 4 provides as follows:

Competencies. A candidate for a paraprofessional credential must provide verification of training to assist and support a licensed teacher in items A to I:

A. competency 1: philosophical, historical, and legal foundations of education, including:

(1) sensitivity to the beliefs, traditions, and values across cultures and how these impact the relationships between children, families, and schooling;

(2) awareness of the human and legal rights and responsibilities of parents and children and youth as the rights and responsibilities relate to students;

(3) understanding the distinctions between roles and responsibilities of professionals, paraprofessionals, and support personnel;

(4) understanding the purposes and goals of education and instruction for all students; and

(5) knowledge of relevant laws, rules, regulations, and local district policies and procedures to ensure paraprofessionals work within these parameters;

B. competency 2: characteristics of students, including:

(1) knowledge of the similarities and differences between cognitive, communicative, physical, social, and emotional needs of students and the factors that influence these different needs;

⁸⁰ Compare, Minn. Stat. § 120B.363, subd. 1 (2008).

(2) awareness of the effects that exceptional conditions have on a student's life, family, school, and community;

(3) knowledge of and respect for the diverse backgrounds, such as cultural, linguistic, and environmental backgrounds, of students and how these characteristics affect the student's life and learning;

(4) understanding the effects and side effects of medications commonly prescribed for students; and

(5) awareness of the potential implications of various student characteristics on learning and achievement;

C. competency 3: assessment, diagnosis, and evaluation, including:

(1) awareness of the tools used by a district for student assessment, diagnosis, and evaluation; and

(2) the ability to collect and record performance data on students under the direction of a licensed teacher, while respecting student confidentiality and the laws regarding ethical practices of assessment;

D. competency 4: instructional content and practice, including:

(1) the ability to use learning styles theory in supporting instructional practices;

(2) awareness of the challenges and expectations of various learning environments;

(3) the ability to establish and maintain rapport with students;

(4) the ability to draw on knowledge and resources regarding a variety of developmental and age-appropriate instructional methods, techniques, and materials when supporting the instruction of the licensed teacher;

(5) the ability to assist in adapting instructional strategies and materials according to the needs of the student and under the direction of a licensed teacher; and

(6) the ability to follow oral and written direction of licensed teachers, seeking clarification as needed;

E. competency 5: supporting the teaching and learning environment, including:

(1) the ability to assist and reinforce elements that support a safe, healthy, and effective teaching and learning environment;

(2) awareness of the ways in which technology can assist teaching and learning;

(3) understanding strategies for assisting with the inclusion of students in various settings;

(4) the ability to use strategies that promote the student's independence;

(5) awareness of how paraprofessionals can impact the overall learning environment for students and staff; and

(6) the ability to prepare and organize materials to support teaching and learning, as directed by a licensed teacher;

F. competency 6: managing student behavior and social interaction skills, including:

(1) understanding applicable laws, rules, and regulations, and procedural safeguards regarding the management of student behaviors;

(2) understanding ethical considerations inherent in the management of student behaviors;

(3) understanding district and building behavior management plans for students;

(4) awareness of primary factors that influence student behavior;

(5) the ability to effectively employ a variety of strategies that reinforce positive behavior;

(6) the ability to collect objective and accurate information on student behavior provided to licensed professionals, as appropriate, and directed by a licensed teacher;

(7) awareness of the social skills needed for current and future environments; and

(8) the ability to reinforce the development of student social skills by using appropriate strategies to modify the environment;

G. competency 7: communication and collaboration partnerships, including:

(1) the ability to participate as a member of the educational team when requested to attend conferences with families or primary caregivers, with an understanding of some of the concerns of parents;

(2) the ability to use ethical practices for confidential communication about students;

(3) the ability to be sensitive and respectful in communications regarding all children and families, regardless of differences in cultural heritage, lifestyle, values, and home environment;

(4) awareness of the roles of students, parents, teachers, paraprofessionals, and other school and community personnel in planning an individualized program, when relevant;

(5) the ability to employ constructive communication strategies and approaches in working with and responding to students, students' families, and school and community personnel;

(6) the ability to follow teacher instructions while conferring and collaborating with teachers about student schedules, instructional goals, and performance; and

(7) the ability to understand and use appropriate educational terminology regarding students, roles, and instructional activities;

H. competency 8: professionalism and ethical practices, including:

(1) demonstrating a commitment to assisting students in reaching the students' highest potential, including the modeling of positive behavior;

(2) carrying out responsibilities in a manner that demonstrates knowledge of, and a positive respect for, the distinctions between the roles and responsibilities of paraprofessionals, professionals, and other support personnel;

(3) performing duties within the context of written standards and policies of the school, state, or agency where the candidate is employed;

(4) performing duties in a manner that demonstrates the ability to separate personal issues from the candidate's employment responsibilities;

(5) showing respect for the diversity of students;

(6) demonstrating proficiency in academic skills, including oral and written communication, while knowing how to self-evaluate one's own knowledge of the content being taught; and

(7) showing a willingness to participate in ongoing staff development, self-evaluation, and apply constructive feedback; and

I. competency 9: academic instructional skills in:

(1) mathematics, including:

(a) supporting and reinforcing the instruction of students in mathematics following written and oral lesson plans developed by licensed teachers;

(b) utilizing effective developmental, age-appropriate, and culturally sensitive instructional strategies in mathematics that support the instruction of licensed academic teachers;

(c) accessing and effectively using available resources, including technology, for supporting teacher instruction in the subject of mathematics, such as Internet resources, instructional manuals, tangibles, and colleagues;

(d) supporting a licensed teacher in the gathering and recording of data regarding student performance in the area of mathematics, such as rubric instruments and curriculum-based measurement;

(e) knowing terminology related to the instruction of mathematics; and

(f) understanding how Minnesota Academic Standards and Assessment, including state and local testing, direct the teaching of mathematics;

(2) reading, including:

(a) supporting and reinforcing the instruction of students in reading following written and oral lesson plans developed by licensed teachers;

(b) utilizing effective developmental, age-appropriate, and culturally sensitive instructional strategies in reading that support the instruction of licensed teachers;

(c) accessing and effectively using available resources, including technology, for supporting teacher instruction in the subject of reading, such as Internet resources, instructional manuals, tangibles, and colleagues;

(d) supporting a licensed teacher in the gathering and recording of data regarding student performance in the area of reading, such as rubric instruments and curriculum-based measurement;

(e) knowing terminology related to the instruction of reading; and

(f) understanding how Minnesota Academic Standards and Assessment, including state and local testing, direct the teaching of reading; and

(3) writing, including:

(a) supporting and reinforcing the instruction of students in writing following written and oral lesson plans developed by licensed teachers;

(b) utilizing effective developmental, age-appropriate, and culturally sensitive instructional strategies in writing that support the instruction of licensed teachers;

(c) accessing and effectively using available resources, including technology, for supporting teacher instruction in the subject of writing, such as Internet resources, instructional manuals, tangibles, and colleagues;

(d) supporting a licensed teacher in the gathering and recording of data regarding student performance in the area of writing, such as rubric instruments and curriculum-based measurement;

(e) knowing terminology related to the instruction of writing;
and

(f) understanding how Minnesota Academic Standards and Assessment, including state and local testing, direct the teaching of writing.

87. The Board asserts that the referenced nine competencies “reflect the necessary knowledge and skills of paraprofessionals” As it argues in the SONAR:

This subpart identifies the nine required competency areas as well as the sub-competencies which serve to further define the broad competency areas. The competencies were developed by Minnesota educators through a review of the research and literature, analysis of statements from professional organizations regarding the role of paraprofessionals, and input from a variety of Minnesota constituents, including: administrators, teachers, paraprofessionals, representatives from higher education, representatives from unions and professional organizations, parents, and others. Although the competencies were developed nearly a decade ago, stakeholders agree that they continue to reflect the necessary knowledge and skills of paraprofessionals who work in instructional roles with students in Minnesota schools.⁸¹

88. The Board further explains that the rule’s detail as to sub-competencies responds directly to the critique in the prior rulemaking – OAH Docket Number 3-1302-19260-1 – that “the nine core competencies” lacked specific criteria by which they could be assessed. The Board argues that the inclusion of the sub-competencies provides the clarity necessary to determine when, and if, the competencies have been achieved.⁸²

89. Moreover, the Board states that it does not expect the 60 clock hours of training requirement to reflect a one-to-one correlation for each of the 49 sub-competencies. Rather, as stated in Subpart 5 of the proposed rule “verification must be based on a minimum of 60 clock hours reflecting all of the competency areas” According to the Board, this language recognizes that training needs will vary among school districts and permits locally-tailored approaches to meet specific needs.⁸³

90. Commentators objected to the proposed competencies as being overly burdensome and “grossly exceeding” the competencies necessary for most paraprofessional positions. In the view of these commentators, the proposed rule

⁸¹ SONAR at 7.

⁸² *Id.* at 8

⁸³ Board’s Response at 3.

focuses inappropriately on “instructional paraprofessionals” at a time when many paraprofessionals serve in assignments outside of the classroom.⁸⁴

91. The Administrative Law Judge disagrees. The Board’s chosen set of competencies reasonably follow from the requirement that the Board evaluate a “paraprofessional’s knowledge of reading, writing, and math and the paraprofessional’s ability to assist in the instruction of reading, writing, and math.”⁸⁵

92. With that said, the Administrative Law Judge recommends the following technical correction to subpart 4 at item I (b): “licensed academic teachers”. This recommended change aligns the rule with the underlying statutory text, makes the language of subpart 4 consistent throughout the proposed rule, is needed and reasonable, and does not make the rules substantially different than originally published in the *State Register*.

93. The Board has adequately supported the category areas in which competencies must be demonstrated. The referenced categories meet the limitations of the delegation of rulemaking authority and are rationally-related to the objectives set by the Legislature. This proposed rule at subpart 4 is needed and reasonable.

Subpart 5 – Verification of core competencies

94. This subpart states that the Board must verify an applicant’s completion of training in the nine core competencies under subpart 4:

[V]erification must be based on a minimum of 60 clock hours reflecting all of the competency areas and may include multiple types of experiences and information including academic coursework, professional development and training experiences, workshops, work experiences, examinations, and other professional activities. The Board of Teaching may establish policies including submission windows and use of review panels for the verification of competencies.

95. The Board states that this subpart details the process required for verification of competencies. In the earlier rulemaking proceeding, the Board left it to individual school districts to develop their own processes by which applicants could demonstrate core competencies. ALJ Sheehy found that the lack of standards for assessing and verifying competencies rendered the earlier version of the proposed rule defective. According to the Board, the new language corrects this defect by detailing the substantive standards for verification.⁸⁶

⁸⁴ See, e.g., Ex. RR (Comments of Lori Fildes, Director of Special Services for Wayzata Public Schools); Post-Hearing Comments of Independent School District 196.

⁸⁵ *Compare*, Minn. Stat. § 120B.363, subd. 1 (2008).

⁸⁶ SONAR at 9-10.

96. The Board states that it will undertake the verification process. Moreover, it will verify the completion of training based upon a 60 clock hour standard and the submission of information reflecting professional development and training.

97. The Board notes, however, that in order to complete this work it may be necessary to establish policies regarding “windows” for the submission of applications and “review panels.”

98. The Administrative Law Judge concludes that the Board’s claim of authority to establish new policies in the future, outside of rulemaking, is modest and limited; it reaches only the operational methods for reviewing submitted applications. Importantly, the substantive standards for assessing these applications are set forth in the proposed rule.

99. The operational methods that the Board uses to complete this work “involve only the internal management of the agency,” “do not directly affect the rights of the public,” and are committed to the Board’s good judgment and discretion. Under the rule announced by the Minnesota Court of Appeals in the case of *In the Matter of Leisure Hills Health Care Center*, the Board may reserve to itself the authority to make, and periodically revise, these types of operational decisions without rulemaking. The Board has demonstrated a rational basis for the language of subpart 5.⁸⁷

Subpart 6 – Procedures for state issuance of a paraprofessional credential

100. Proposed subpart 6 sets out the process on applying for, and obtaining, the paraprofessional credential. The proposed rule states:

An applicant for a paraprofessional credential must submit to the state:

- A. verification by the Board of Teaching of the requirements under subpart 5;
- B. verification of a minimum of two consecutive years of service in the same school district as a paraprofessional;
- C. official verification of passage of a state-approved examination in reading, writing and mathematics for paraprofessionals; and
- D. an application for a credential including the application fee.

101. The Board states in its SONAR that this subpart provides a clear and straight-forward application process. The Board intends to charge an application fee of

⁸⁷ See, *In re Leisure Hills Health Care Center*, 518 N.W.2d 71, 74-75 (Minn. App.) review denied (Minn. 1994).

\$57.00, the same fee charged for a teacher license under Minn. Stat. § 122A.21, subd. 1.⁸⁸

102. Further, the Board did acknowledge that the amount of the application fee would likely increase to \$62.70 in the near future.⁸⁹

103. There are several issues with the proposed language of subpart 6. First, the phrase “submit to the state” is unclear. The Administrative Law Judge recommends the following technical correction to subpart 6: “An applicant for a paraprofessional credential must submit to the state officials designated by the Board to receive such applications: . . .” Such a change is needed and reasonable and would not make the rule substantially different from its form as published in the *State Register*.

104. Second, the Administrative Law Judge notes that subpart 6 requires verification of the requirements under subpart 5 and verification of a minimum of two consecutive years of service in the same school district as a paraprofessional. Yet, as to the third requirement in the series, the Board requires “official verification” of passage of a state-approved examination. The Administrative Law Judge recommends that the Board delete the word “official” from item C, so as to make the rule language consistent throughout the subpart. Such a change is needed and reasonable and would not make the rule substantially different from its form as published in the *State Register*.

105. Third, the failure to specify the amount of the application fee renders the proposed rule in subpart 6, item D defective. Under Chapter 146 of the 2007 Laws of Minnesota, the Board has statutory authority to charge a fee in connection with the paraprofessional credential application; yet this grant of authority is not so expansive as to permit the Board to unilaterally set and adjust this amount. The amount of the application fee is not a matter of the “internal management of the agency,” but rather directly “affects the rights of the public.” The best reading of the delegation of authority is that the Legislature intended that the Board’s fee practice be established by rule.⁹⁰

106. In such a circumstance, the Board has at least two regulatory options. The Board has established a rational basis in the SONAR for charging a fee in the amount of \$57.00 and it could specify this amount in its rule. Such a change is needed and reasonable and would not make the rule substantially different from its form as published in the *State Register*.

107. Alternatively, the Board could link the application fee for a paraprofessional credential to the amounts charged in another similar context – such as the fees charged under Minn. Stat. § 122A.21, subdivision 1 for “the issuance, renewal, or extension of a license to teach”⁹¹ Such a change is needed and reasonable and

⁸⁸ SONAR at 10.

⁸⁹ Ex. QQ at 3.

⁹⁰ Compare, 2007 Laws of Minnesota, Chapter 146, Article 2, Section 34 with Minn. Stat. § 122A.21, subsd. 1 and 2 (d) (2008); see also, *In re Leisure Hills Health Care Center*, 518 N.W.2d at 74.

⁹¹ See, Minn. Stat. § 122A.21, subd. 1 (2008).

would not make the rule substantially different from its form as published in the *State Register*.

Subpart 7 – Paraprofessional credential

108. Subpart 7 requires the credential to include the date it was granted and makes clear that the credential does not expire once it is issued by the Department of Education.

109. The Board notes that because the credential does not expire, there are no renewal requirements. The Educator Licensing Division of the Minnesota Department of Education will issue the credential once the Board has completed its verification process.⁹²

110. The Administrative Law Judge concludes that the language of subpart 7 is needed and reasonable.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Teaching gave proper notice in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Finding 105.
4. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.
5. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.
6. The amendments to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

⁹² SONAR at 10. It is common practice for the Department of Education to issue licenses on behalf of the Board once the Board has performed its duties under statute and rule.

7. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3, as noted in Finding 105-107.

8. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

9. Any Findings that are more properly characterized as Conclusions are hereby adopted as such.

10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted, except where otherwise noted above.

Dated: May 6, 2010

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally Recorded; No Transcript Prepared

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Board of

actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit the final version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

MEMORANDUM

In addition to the comments addressed in the Findings above, opponents of the proposed rule made one of seven basic critiques. Specifically, these commentators opposed the proposed rules on the grounds that:

- (1) it is unwise to grant a credential based upon the completion of training when the best practices in education are continuously developing and changing;⁹³
- (2) the ParaPro test required by federal law is a sufficient indication of professional achievement and excellence;⁹⁴
- (3) local training programs achieve the same or better results than will be achieved by a statewide credentialing program;⁹⁵
- (4) promulgation of the standard will expose the school districts that hire, or retain, the paraprofessionals who do not hold the credential, to litigation risks;⁹⁶

⁹³ See, e.g., Comments by the Minnesota School Board Association; Comments of Independent School District 196; Comments of District 197 Schools; Comments of the Osseo Area Schools.

⁹⁴ See, e.g., Public Hearing Ex. 1; Comments of Independent School District 15; Comments of Intermediate School District 916; Comments of Bemidji Area Schools; Comments of Duane Borgeson.

⁹⁵ See, e.g., Comments of Independent School District 196.

- (5) it will increase the political and collective bargaining pressure upon local school districts to align training programs to the terms of the proposed rules;⁹⁷
- (6) it will increase the political and collective bargaining pressure upon local school districts to pay higher wages to those paraprofessionals who hold the credential;⁹⁸ and,
- (7) it will increase the political and collective bargaining pressure upon local school districts to pay the costs for training or accreditation record-keeping.⁹⁹

In the view of the Administrative Law Judge, these particular criticisms do not relate to the regulatory choices made by the Board; but rather challenge the idea that a separate paraprofessional credential should exist at all. Importantly, these are objections that the Minnesota Legislature presumably heard, understood and resolved when it enacted the two statutes providing for this rule.

In the context of the legislative mandate to establish a paraprofessional credential, the subsequent regulatory choices by the Board were lawful, needed and reasonable.

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⁹⁶ See, e.g., Comments of Independent School District 196; Comments of Independent School District 279; Comments of Bemidji Area Schools; Comments of Denny Ulmer.

⁹⁷ See, e.g., Comments of Independent School District 279.

⁹⁸ See, e.g., Comments by the Minnesota School Board Association; Comments of Independent School District 196; Comments of Intermediate School District 916; Comments of Bemidji Area Schools.

⁹⁹ See, e.g., Comments of Independent School District 196.